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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 456

UNITED STATES COLD STORAGE CORPORATION,
Petitioner,

v.

MINUTE MAID CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

LELAND E. FISKE,
2400 Adolphus Tower,
Dallas 2, Texas,
Counsel for Respondent.

WARLICK LAW, INC —2263 VALDINA STREET—DALLAS—ME 1-3130

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OPINION BELOW

No opinion was rendered by the District Court. The opinions of the Court of Appeals on the original argument and on rehearing (reported in 291 Fed. 2d 577) are attached as Appendices I and II to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT

The opinion of the Court of Appeals attached as Appendix I to the Petition for Writ of Certiorari contains a full statement of the nature of the case and the matters involved.

The decision of the Court of Appeals in this case was that, under the Texas law in effect at the time, a lender is also liable as a partner for the debts of the venture concerned where the lender:

a. shares "as its property" the profits of the venture;

b. controls the operations of the venture jointly with the other party concerned; and

c. provides 100% of the capital for the venture which is not available in normal lending transactions.

The Petition for Writ of Certiorari principally seeks to show a conflict with state decisions by ignoring the sharing of control. As the Court of Appeals' opinion states, "There can be no question that the parties had joint control over the enterprise". Respondent, accordingly, deems it pertinent to supplement the statement of the case made in the Court of Appeals' opinion solely by reference to the findings and undisputed facts which clearly require the conclusion of joint control of the venture by United States Cold Storage Corporation ("Cold Storage") and United Foods, Inc. ("United Foods").

The principal uncontested evidentiary facts showing Cold Storage's participation in control are as follows:

1. Paragraph 11 of the Memorandum of Agreement of May 1, 1957, between the parties held to have been partners (R. 364) expressly provides for a joint right of control on the most vital factor of the business venture which was the matter of forward buying in the attempt to realize speculative profits from price increases.

2. Even Petitioner's own witness, Mr. McKenzie, conceded that Cold Storage "exercised a certain measure of control". (R. 273.)

3. Cold Storage alone held the most vital element of control, the purse strings. Cold Storage furnished at will the entire capital of the business and United Foods could not have obtained this capital from normal credit sources. Finding 31, at R. 341-342.) To use the words of United Foods' witness Patterson: "They (Cold Storage) could have stepped in and written me off pretty damned fast", and "we had to depend on them (Cold Storage)". (R. 203.)

4. Cold Storage kept actual possession of the funds representing the profits developed by the venture. As Cold Storage's witness Britt stated, "Yes, we had control of it". (R. 222.)

5. Cold Storage kept the accounts of the joint revenues and expenses which determined the profit to be shared by the parties. (R. 213, 268.)

6. Cold Storage had physical possession of and complete dominion over the inventory, which was the principal asset

of the business. The originals of the warehouse receipts for goods stored under the Memorandum of Agreement of May 1, 1957 were never released to United but were held by Cold Storage. (R. 267.) These warehouse receipts were made out jointly to United Foods and/or Cold Storage, despite the fact that the form on which they were prepared also provided that Cold Storage had a lien for all charges and expenses. (R. 365-369.) Cold Storage's own witnesses explained the extent of this fact of control by testifying that the retention of the receipts made out in this manner made it possible for Cold Storage to have borrowed at banks against the merchandise, treating the goods as its own. (R. 267-268.)

The facts establish beyond dispute that Cold Storage shared the control, and indeed indicate that it held the dominant position.

ARGUMENT

I.

The Decision Below Is Clearly Correct and Not in Conflict With Governing Texas Decisions

In this case, Cold Storage had, by written agreement, the right to retain one-half of the profits of the venture "as its property" and also shared in deficits accumulated in the Special Account. Even if these were the only indicia of partnership, the holding would be in accord with the Texas cases. The leading decision of the Texas Supreme Court on the law of partnership, *Thompson v. Schmitt, 115 Tex. 53, 274 S. W. 554 (1925)*, held that the beneficiaries sharing in the profits

of a business trust were partners even though those beneficiaries had clearly not agreed to bear the loss charged to them in the action and had no voice in control, but merely owned a share of the profits. Under the holding in *Thompson v. Schmitt*, the presumption of a partnership arising from profit sharing alone is a far stronger matter in Texas than in other states. See *39 Harv. L. Rev. 276.*

We need not debate any fine points of Texas partnership law, however, since the opinion below was based upon the assumption that Cold Storage's statement of Texas law was correct. Cold Storage argued there, as it does in its Petition here, that a holding of partnership requires some additional element either in the nature of joint control or an express agreement to share all losses. Petitioner's entire argument as to a claimed conflict with certain Texas partnership decisions is predicated upon an erroneous conclusion that Cold Storage did not participate in the control of the joint venture. The Court of Appeals was clearly correct in reaching the contrary conclusion that Cold Storage did share control of the venture, that conclusion being based upon the Memorandum of Agreement of May 1, 1957 itself and the undisputed facts set forth in the statement of facts above.

The decision below, therefore, does not conflict with the two Texas Courts of Civil Appeals cases cited by Petitioner, both of which recognize that a different result would have been reached if the facts had led to a conclusion that the control was shared by the alleged partners. *U. S. Truck Lines v. Texaco, Inc., 337 S. W. 2d 497 (Tex. Civ. App., 1960), error refused; Dillard v. Wholesale, 286 S. W. 2d 675 (Tex. Civ.*

App., 1956), no writ history. As a matter of fact, in the *Dillard* case the Court held Dillard liable as a partner from the time he began to participate in control.

The other state decision cited by Petitioner, *Fink v. Brown, 215 S. W. 846 (Tex. Com. App., 1919)*, also involved a situation where the party held not to be a partner had no voice whatsoever in control. The case involved a lease of real estate for a base rental plus a share of the profits made on the premises. It will be noted, moreover, that *Thompson v. Schmitt, supra*, relied upon by the Court of Appeals, was subsequent to the *Fink* case and would control even in the event that there were any inconsistency.

Petitioner's further contention that the holding in this case conflicts with decisions as to the propriety of a corporation's becoming a member of a partnership is clearly without merit. The present suit is not one between the alleged partners but is by an outsider against a partnership whose transactions have been executed. The leading Texas decision cited by Petitioner, *Luling Oil & Gas Co. v. Humble Oil & Refining Co., 144 Tex. 475, 191 S. W. 2d 716 (1945)*, was a suit on a contract governing the operation of oil leases in which the parties had undivided interests. Luling claimed that the operating agreement constituted the two parties partners so that limitations on an accounting did not commence to run until final accounting between the parties. The court held that the limitation statute governing suits on written contracts was applicable. The court recognized that a different

rule was applied where an outsider alleges that two corporations are partners, and where the partnership transactions have been executed or partially performed, stating:

> "There are instances where corporations undertake to enter into partnership relations and where the transactions are executed or at least partially performed; they will not be permitted to take advantage of their illegal act in order to defeat justice. Miller Indemnity Underwriters v. Patten, Tex. Civ. App., 238 S. W. 240, 245; Indiahoma Refining Co., et al, v. Wood, Tex. Civ. App., 255 S. W. 212; Humble Oil & Refining Co. v. Strauss, Tex. Civ. App., 243 S. W. 528; Whatley v. Cato Oil Co., Inc. et al., Tex. Civ. App., 115 S. W. 2d 1205; McDaniel v. State Fair of Texas, Tex. Civ. App., 286 S. W. 513; Burton-Lingo Co. v. Federal Glass & Paint Co., Tex. Civ. App., 54 S. W. 2d 170. The relationship of partners, joint adventure or mining partners being contractual in its nature, whether such a relationship exists generally depends upon the intention of the parties. Where the controversy is between the parties and the parties are corporations, a court would not declare that a partnership existed unless the intention clearly appeared, even though the purposes for which the contract was made were fully within the purposes for which the corporations are chartered." *(191 S. W. 2d 716, at 722.)*

Moreover, even in suits between alleged partners, Texas holdings that the partnership contract was *ultra vires* have been based upon the lack of authority in the charter of the corporations involved. *Luling Oil & Gas Co. v. Humble Oil & Refining Co., supra.* Cold Storage did not introduce its charter in evidence at the trial of this case in support of its *ultra vires* defense. Accordingly, no showing whatsoever has been made as to whether or not the partnership might have

been perfectly proper even as against prompt objection by stockholders of Cold Storage.

The Texas law applicable to the situation presented here is summarized as follows in *Burton-Lingo v. Federal Glass & Paint Co., 54 S. W. 2d 170 (Tex. Civ. App., 1932), no writ history,* where the court stated:

> "The controlling question in this case, as we view it, is whether or not appellant was bound by the contract of J. M. Pearson. Were appellant an individual and not a corporation, there would be no question as to the relation between it and J. M. Pearson. Their contract made them joint adventurers, each having the authority to bind the other by contracts made in furtherance of their joint enterprise. Does the fact that appellant is a corporation affect its liability on the executed contract of Pearson of which it has received the benefits? This question is so clearly discussed by Justice Boyce in Millers' Indemnity Underwriters v. Patten (Tex. Civ. App.), 238 S. W. 240, 245, that we prefer to adopt his language as our own, wherein he states: 'It is the law that a corporation, unless its charter authorizes it to do so, may not enter into a partnership. * * * But, when the parties have entered into such relations, and done business as partners, the law regards the acts already performed practically in the same way as if there had been a real partnership, though they are not perhaps strictly speaking partners. Some of the authorities refer to them as "joint adventurers", and the liability arising from such a relationship as that of persons engaged in a joint enterprise. * * * The rights of the parties engaged in such an enterprise and those dealing with them, as to past transactions, are settled on practically the same basis as if they had been partners. * * * For practical purposes it would make no particular difference whether the relation would have been that of a partner, strictly speaking, or joint operators of the plant'." *(54 S. W. 2d 170, pp. 171 and 172.)*

II.

The Decision in This Case Has No General Application to Future Decisions

The facts of the present case are unique. The venture between United and Cold Storage had no counterpart in the industry within the knowledge of any witness asked about it. (R. 220, 249, 267 and 284.) Moreover, the opinion in this case will not necessarily serve as a precedent for future decisions where Texas law is applicable since the Texas Legislature has adopted the Uniform Partnership Act, effective January 1, 1962. That Act does not govern this case and was expressly excluded from consideration by the Court of Appeals, as stated in its opinion denying Petitioner's Motion for Rehearing, thus leaving open any question as to the effect of that Act.

This is clearly not a case of sufficient importance to warrant review by this court.

CONCLUSION

The opinion below correctly applies the governing state court decisions to the facts of this case. And, by reason of the uniqueness of those facts and the Court of Appeals' express exclusion of any consideration of the Uniform Partnership Act, which will govern future transactions, the decision below is a true legal sport. This is an individualized instance outside the scope of those considerations of importance which justify disposition of a writ of certiorari on the merits.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

s/ Leland E. Fiske

LELAND E. FISKE,
2400 Adolphus Tower,
Dallas 2, Texas,
Attorney for Respondent.

PROOF OF SERVICE

I, LELAND E. FISKE, one of the attorneys for Minute Maid Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16 day of October, 1961, I served copies of the foregoing brief for Respondent in opposition to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit on the several parties thereto as follows:

1. On United States Cold Storage Corporation by mailing a copy in a duly addressed envelope with postage prepaid to Hubard Taylor Bowyer, Esq., its counsel of record, at 1313 Praetorian Building, Dallas 1, Texas.

2. On United Foods, Inc., by mailing a copy in a duly addressed envelope with airmail postage prepaid to C. E. Gober, Esq., its counsel of record, at the Eighth Floor, Fulton Federal Building, Atlanta, Georgia.

Dated this 16 day of October, 1961.

s/ Leland E. Fiske

LELAND E. FISKE